In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-774

THOMAS HARTEN AND LAURIE HARTEN, PETITIONERS

v.

JOHN COONS, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Thomas Harten, while on active duty in the United States Army, had an elective vasectomy operation performed in a military hospital. Thereafter, petitioner Laurie Harten, wife of Thomas Harten, conceived and bore a child. Petitioners then brought this suit in the United States District Court for the District of New Mexico under the Federal Tort Claims Act; they sued both the military doctors who performed the operation and the United States, alleging that the operation was negligently performed.[1] Petitioners sought $50,000.00 in damages to cover the cost of rearing the child.

The United States moved to dismiss, relying on the rule announced by this Court in *Feres* v. *United States,* 340 U.S. 135, that the government is not liable under the Fed-

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[1]Although the complaint names the two Army physicians as defendants, neither of them was ever served. Thus, as a practical matter, the United States is the only defendant in the case.

eral Tort Claims Act for injuries that "arise out of or are in the course of activity incident to service" (340 U.S. at 146). The district court denied the motion on the ground that a vasectomy is not an operation necessary for the performance of military duty and therefore is not "incident to service" (Pet. App., pp. A6-A7).

The government thereupon took an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. 1292(b). The court of appeals reversed (Pet. App., pp. A1-A5; 505 F.2d 1363), holding that petitioner's injuries were sustained "in the course of activity incident to service and that a suit thereon cannot be maintained" under the Federal Tort Claims Act (Pet. App., p. A5). It found that the operation was performed in a military hospital as an incident to petitioner's status as a serviceman and that (Pet. App., pp. A4-A5):

> when a serviceman on active duty sustains an injury stemming from the military relationship, courts consistently have denied recovery under the Act. Surgery, whether elective or required, is "incident to service" when performed upon a serviceman on active duty because the serviceman is taking advantage of medical privileges granted only to military personnel. [Footnote omitted.]

The case at bar was correctly resolved in accordance with established principles of law and the relevant decisions of this Court. Moreover, since there is no conflict among the circuits regarding the application of the Court's opinion in *Feres* v. *United States, supra,* to servicemen injured during surgical operations performed in military hospitals in the course of active duty, this case presents no issue warranting review by this Court.

In *Feres* v. *United States, supra,* 340 U.S. at 146,[2] this Court held:

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting [the Federal Tort Claims Act] created a new cause of action dependent on local law for service-connected injuries* * *.

See also *United States* v. *Muniz,* 374 U.S. 150, 159; *Peluso* v. *United States,* 474 F.2d 605 (C.A. 3), certiorari denied, 414 U.S. 879.

The law is clear that, if an operation is performed on a serviceman in a military hospital, any injury to him arises "in the course of activity incident to service" within the meaning of *Feres.* The courts of appeals have applied this principle to cases of elective surgery and have consistently held that malpractice committed upon a serviceman during elective surgery in a military hospital is "incident to service" under *Feres.* Thus, in *Lowe* v. *United States,* 440 F.2d 452 (C.A. 5), certiorari denied, 404 U.S. 833, the plaintiff, a member of the Armed Services, brought suit under the Federal Tort Claims Act alleging negligence by military doctors in the performance of elective surgery in a military hospital. The Fifth Circuit held that the suit was barred by *Feres* (440 F.2d at 452-453):

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[2] The Court in *Feres* considered three separate cases. In two of the three, the complaints alleged that soldiers on active duty had been negligently treated by army surgeons.

> "[I]t is obvious that the [plaintiff] could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be 'in the course of activity incident to service.' "
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> * * * This result is not altered by the fact that the surgery here involved was elective. It was nevertheless "activity incident to service."

Similarly, in *Alexander* v. *United States,* 500 F.2d 1, certiorari denied, January 13, 1975, No. 74-461, the Eighth Circuit held that *Feres* barred a suit under the Federal Tort Claims Act to recover for the alleged negligence of miltary doctors where plaintiff was injured during the performance of elective surgery, even though he was on leave at the time he was admitted to the hospital. See also *Shults* v. *United States,* 421 F.2d 170 (C.A. 5); *Chambers* v. *United States,* 347 F.2d 224 (C.A. 8); *Buer* v. *United States,* 241 F.2d 3 (C.A. 7). There is thus no merit to petitioner's contention that the *Feres* bar is inapplicable here because he was injured during the performance of elective surgery not necessary for the performance of his military duty.

Brooks v. *United States,* 337 U.S. 49, and *United States* v. *Brown,* 348 U.S. 110, do not indicate a contrary result. In *Brooks,* servicemen on furlough were struck by a government truck while on a public highway. Suit under the Federal Tort Claims Act was permitted because the Brooks brothers were on furlough at the time and thus the injuries "had nothing to do with the Brooks' army careers" (337 U.S. at 52). In *Brown,* the Court allowed a veteran's action un-

der the Federal Tort Claims Act for negligence of military doctors. The Court reasoned that *Feres* was inapplicable because Brown's injury occurred subsequent to his discharge from the Army "while he enjoyed a civilian status" (348 U.S. at 112).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.